

The application was initially reviewed by Technical Staff of the Maryland-National

Capital Park and Planning Commission (M-NCPPC) who, in a report dated November 30, 2001, recommended approval. The Planning Board considered the application on December 6, 2001, and unanimously recommended approval. A public hearing was conducted on December 19, 2001, and testimony was presented in support of and in opposition to the application. The record was closed on January 11, 2002.

II. BACKGROUND FACTS

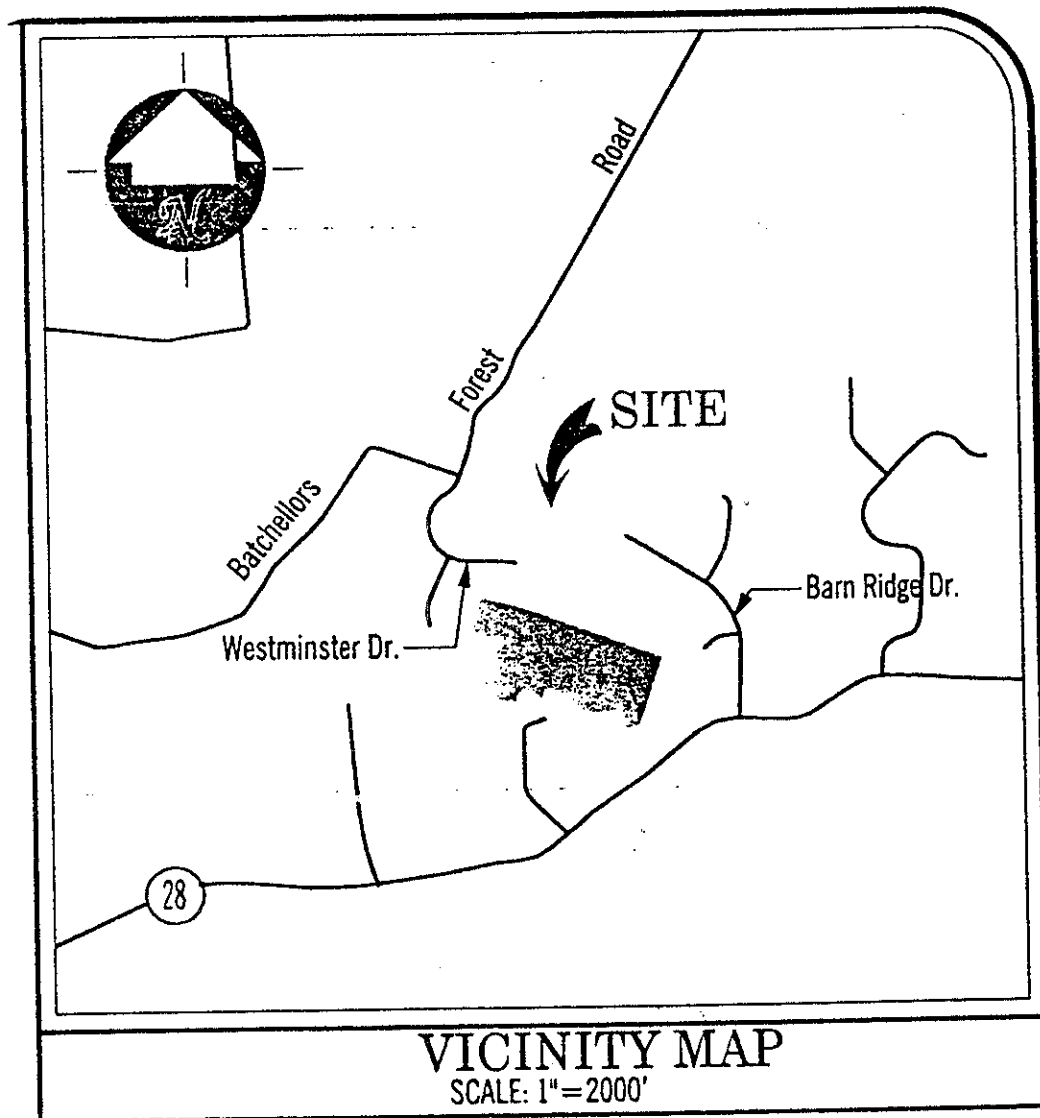
For the convenience of the reader, the background facts are grouped by subject matter. Where there are conflicts in the evidence, these conflicts are resolved under the preponderance of the evidence test.

A. Subject Property

The subject property (referred to as the Lockwood property) lies in the southeastern portion of Olney. It is located generally north of Norbeck Road, between Georgia Avenue on the west and Layhill Road on the east. More specifically, the site is located approximately 360 feet south of the terminus of Westminster Drive, which connects to Batchellors Forest Road to the west. Westminster Drive terminates at the western edge of the parcel immediately north of the Lockwood property, known as the Guzick property. To the east of the Lockwood property, Barn Ridge Drive (which connects to Norbeck Road to the southeast) approaches near the Lockwood property, but does not connect to it. Although near the edges of the Lockwood property, Westminster Drive and Barn Ridge Drive do not touch the property and do not connect to each other, nor are they proposed to do so. Thus, under the present conditions the Lockwood property is landlocked.

The property is roughly rectangular, about 700 feet deep and 1,600 feet wide, and measures 28.48 acres. It is currently undeveloped and entirely wooded. A tributary of the Northwest Branch bisects the property, flowing from north to south. Another stream, Batchellor's Branch,

converges with Northwest Branch just inside the southern property line. Thus, an environmentally sensitive area of floodplain, wetlands, and stream valley buffer cuts a wide swath through the site. The stream valley buffer incorporates all of the floodplain and areas within 125 feet of the stream, which together comprise approximately 18 acres of the 28-acre site. Slopes leading to high ground on either side of the stream valley abut the floodplain. This high ground is where the proposed development would be located. The general location and shape of the site are depicted below.



B. Zoning History

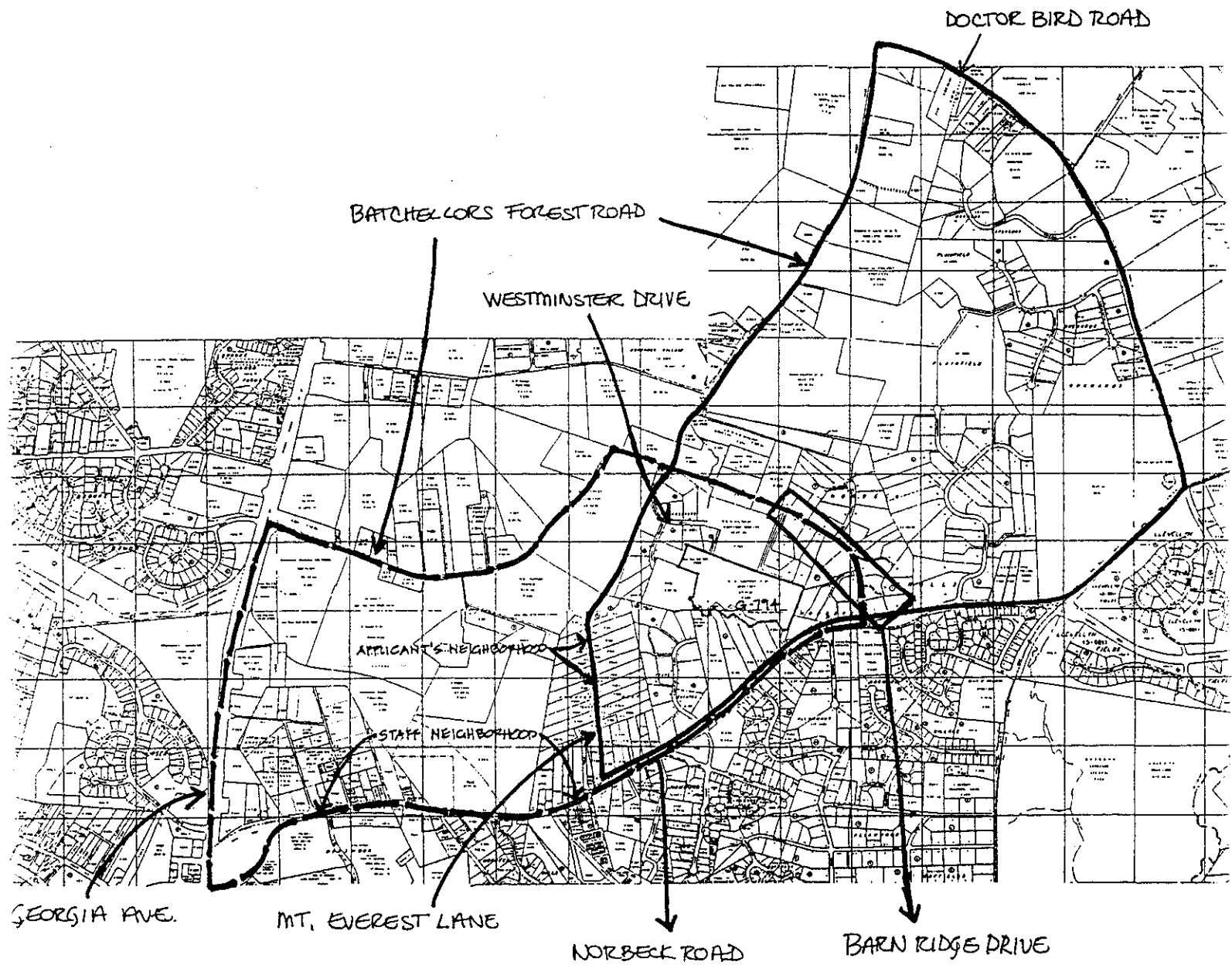
The property was originally classified under the R-A (Rural-Agricultural) Zone by the 1954 regional district zoning. The R-A Zone permitted one dwelling unit per two acres. This zoning classification was reaffirmed by county-wide comprehensive zoning in 1958. In 1967, the R-A Zone was confirmed by Sectional Map Amendment (SMA) E-998. The R-A Zone has since been redesignated as the RE-2 Zone, and this zoning classification was confirmed by comprehensive zoning under SMA G-256 in 1980.

C. Surrounding Area

An impact area must be identified so that compatibility can be properly evaluated. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

In the subject application, the M-NCPPC Technical Staff defined the surrounding area as extending from Barn Ridge Drive, a few hundred feet east of the Lockwood property, west to Georgia Avenue. The Applicant defined the surrounding area as extending from Mt. Everest Lane, several hundred feet west of the Lockwood property, northeast to Batchellors Forest Road and Doctor Bird Road. These two proposed surrounding areas are depicted on the map (Ex. 29) reproduced on the next page. In addition, during the public hearing on the application the People’s Counsel, Martin Klauber, suggested that the surrounding area should be defined to include some portion of the area south of Norbeck Road.

The Applicant’s land planner testified at some length during the hearing concerning the appropriate definition of the surrounding area. He conceded that his surrounding area probably

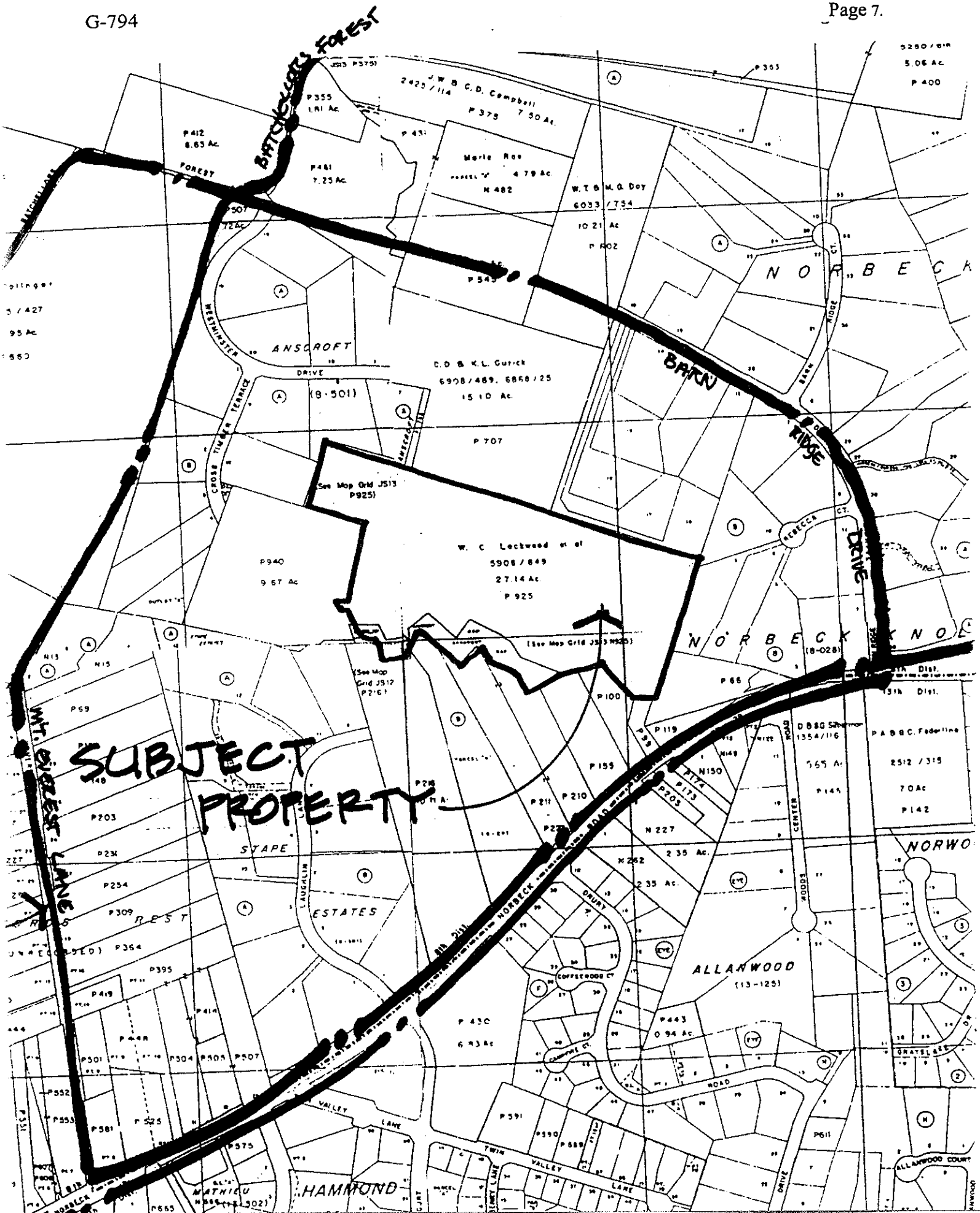


extended too far to the north, as he copied it from the surrounding area used in rezoning the Mandell property, located just slightly north of the Guzick and Lockwood properties, from RE-2 to LDRCD (LMA G-785, decided in 2001). He commented that Technical Staff's definition was also overly

broad, extending too far to the west. He suggested that given the small size of the proposed development – no more than five single-family residences – the best definition is the smaller area where the two areas proposed by himself and by Technical Staff overlap. He was also amenable, however, to Mr. Klauber's suggestion that for analysis purposes, the surrounding area should extend south of Norbeck Road.

Although certain properties immediately south of Norbeck Road are located in close geographic proximity to the Lockwood property, I am persuaded that Norbeck Road is the appropriate southern limit of the "surrounding area" for this application. Norbeck Road does not connect to the Lockwood property, nor would it do so under the roadway access proposed in connection with this application. Moreover, as the Applicant's land planner noted, Norbeck Road is a significant state highway that effectively separates properties south of the road from the Lockwood property and any impact its development might have. Accordingly, the Hearing Examiner considered the surrounding areas proposed by the Applicant and Technical Staff.

As a preliminary matter, I note that the precise definition of the surrounding area has little practical import in this case, given that the zoning classifications and land use patterns within the Applicant's and Technical Staff's proposed areas are essentially the same. I also note that the surrounding area used in the decision that resulted in re-zoning the abutting Guzick property from RE-2 to LDRCD (G-732, decided 1996) was much smaller than those proposed in the present case. In light of the small size of the proposed development, the very limited possibilities of access to the site, and the significant buffering likely along the perimeters of the Lockwood property, I find that the appropriate surrounding area for consideration in this application is the area of overlap between the Applicant's and Technical Staff's proposed areas. This triangular area, as depicted on the map shown on the next page, is bounded on the south by Norbeck Road, on the north/northeast by Barn Ridge



Drive and an imaginary line from there to the northern terminus of Westminster Road, and on the west/northwest by Mt. Everest Road and an imaginary line from the northern terminus of Mt. Everest Road to the junction between Batchellors Forest Road and Westminster Drive.

The surrounding area is classified and developed with a combination of low-density residential uses and open space. Nearly all the land in the surrounding area is zoned RE-2, with the exception of the Guzick property, which is zoned LDRCD. A plan of subdivision has been approved for the Guzick property, providing for the construction of three single-family detached homes in a rural cluster arrangement. Most of the other immediately surrounding properties are similarly developed with large-lot, detached single-family residences. A small number are undeveloped.

D. Master Plan

The land use policies for this area of the County are contained in the 1980 *Olney Master Plan* (the Master Plan). In general, the Master Plan designates the Rural Residential land use and RE-2 zone for the surrounding area identified for this application. It also recommends rural clustering for the southeastern portion of the Olney Policy Area, which includes the Lockwood property.

The Master Plan adopted two preservation strategies for the Olney Policy Area, one dealing with agricultural land and the other with open space. These strategies are to be implemented by two land use categories, Rural-Agriculture and Rural-Open Space:

The Rural-Agriculture area is located generally west of Georgia Avenue and includes the majority of Olney's remaining working farms. This area is the focus of the Plan's farmland preservation policies.

The Rural-Open Space area is located east of Georgia Avenue. Soils here are rich and well-suited for agriculture but much of the land has already been lost to residential development. Farms which remain are scattered and isolated by rural subdivisions. Plan policies in the Rural-Open Space area encourage a carefully planned mix of residential and farming uses. [Approved and Adopted June, 1980 *Olney Master Plan*, p. 60]

The subject property is located in an area designated for rural open space. The open space preservation program recommended:

Rural clustering or grouping . . . in the Rural-Open Space area, east of Georgia Avenue. Rural clustering retains open space by allowing residences to be grouped on a portion of the site and fosters a more cost-effective development pattern than linear or scattered residential. The base density will be 1 unit per 5 acres but individual lots may be smaller. For example, assuming the base zone is 1 dwelling unit per 5 acres and the tract is 200 acres in size, the number of permitted dwellings is 40 units. The cluster method would allow these 40 units to be grouped on lots smaller than 5 acres. The remainder of the tract would be preserved as open space but, more desirably, as a farm. Only the individual lot size--not the overall density--would change through rural clustering.

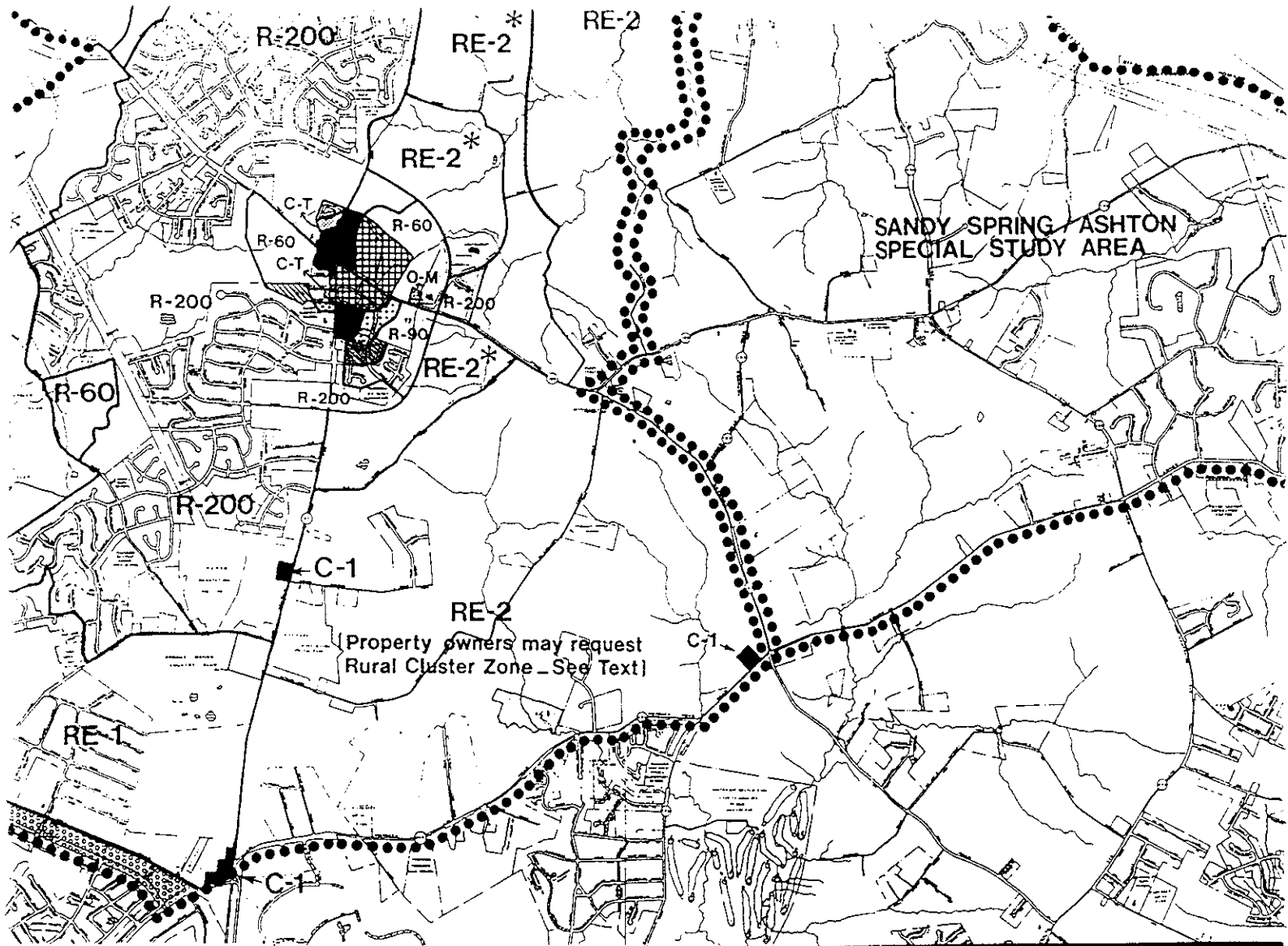
Cluster development should occur on a common roadway, with individual lot access to public arterial or primary roads denied. As with other cluster zones, the cluster would be subject to subdivision review to protect environmental features of the property and its environs. [Approved and Adopted June, 1980 *Olney Master Plan*, pp. 66-67, emphasis supplied.]

The Master Plan states on page 33:

Although the southeast area is presently zoned and planned for 2-acre lot sizes, the rural cluster option would be consistent with the land use goals and objectives. Property owners are encouraged to apply for rural cluster zoning during the sectional map amendment process. . . . This Plan recommends, therefore, that public sewer and water be made available to implement the rural cluster concept in the southeast area. To maintain the character of existing 2-acre lot subdivisions in the southeast area, the Plan recommends that any rural cluster development plan provide similar lot sizes where it abuts such a subdivision.

The zoning recommendations of the Master Plan (Ex. 1) are depicted on the following page.

In 1995, the District Council established a new floating zone known as the Low Density Rural Cluster Development (LDRCD) Zone, which contains the same development standards as the Rural Cluster Zone. The Rural Cluster Zone is Euclidean in nature and is difficult to apply at the request of individual property owners under Maryland's change-mistake rule. The LDRCD Zone is intended to



implement the Master Plan recommendations by providing a rural cluster alternative for individual property owners on land lacking the Rural Cluster Zone designation.

E. Proposed Development

If the Lockwood application is approved, under LDRCD zoning the subject site could be developed with a maximum of five single-family homes, on lots measuring a minimum of 40,000 square feet. Environmental requirements would prevent any development from occurring within the stream buffers. No other limitations can be set at the zoning stage, because the LDRCD Zone does not permit an Applicant to file under the Optional Method and submit a binding schematic development plan. A "Concept Plan" has been submitted in the present case showing how the contract purchaser plans to develop the property. It must be stressed, however, that this Concept Plan is non-binding. The preliminary plan of subdivision or final site plan submitted to the Planning Board for approval would not be required to conform to the Concept Plan submitted to this office.

The Concept Plan, reproduced on the following page, shows three residential lots west of the stream and two east of the stream. The lot sizes are a minimum of two acres; the project planner testified that a larger lot size than the minimum permitted under the zone was chosen to increase compatibility with neighboring large-lot development. Even if the lot size ultimately were made smaller, the maximum number of homes would remain at five. As shown on the Concept Plan, clearing for construction would leave a substantial wooded buffer around each house.¹ Because the stream buffers render the southern portion of the site undevelopable, the proposed development would leave a very substantial wooded buffer between the residential lots and existing residential property south of the site. The Concept Plan also includes a 50-foot strip of permanent, wooded open space between the

¹ As a legal matter, future owners of the individual residences would not be permitted to cut down trees beyond the limits of clearing shown on the final, approved site plan without requesting approval of a revised site plan from the Planning Board. Even if a homeowner were to clear additional trees on his or her lot, however, this would not affect the protection afforded to the areas dedicated as permanent open space.

EX. 31



ARTIST

WIDEVIEW LOCKWOOD
P.O. Box 914
Lodi, CA 95240

northern edge of the lots and the contiguous residential property to the north. That buffer zone would be placed in a Category 1 forest conservation easement that would preserve it permanently. Much of the site would remain in its current natural state, in keeping with the requirement in the LDRCD Zone that at least 60% of the parcel be retained as permanent open space.

The Concept Plan shows the connection of the proposed lots to Westminster Drive via a private drive. The contract purchaser of the Lockwood property has engaged the services of the same land planner and engineer who are working on development of the Guzick property, a 15-acre tract contiguous to the Lockwood property to the north.² The Guzick property was re-zoned from RE-2 to LDRCD in 1996, and the Planning Board approved a plan of subdivision and site plan for the property on December 20, 2001. Roadway and utility access for the Guzick and Lockwood properties are being designed jointly, with right-of-way starting on the Lockwood property and crossing through the Guzick property. As discussed in Part H below under "Roads", this approach represents the only realistic means to provide roadway access to the Lockwood property. In addition, joint planning would help minimize the overall environmental harm from roadway construction and the installation of new water and sewer connections.

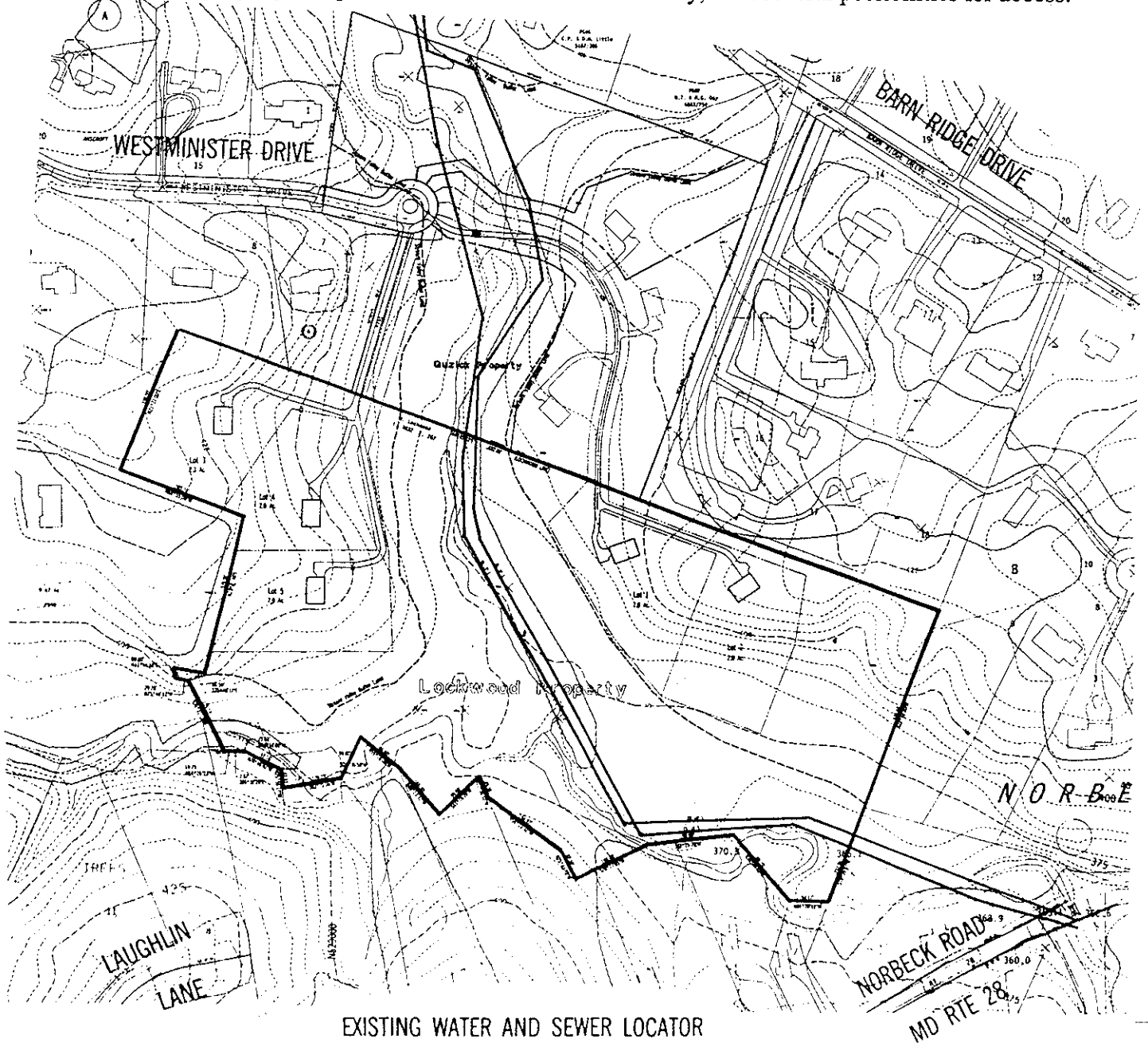
F. Water and Sewer

The purpose of the LDRCD Zone is "to provide suitable sites for low-density residential development which may be served by community sewer and water service" See Code § 59-C-9.25. The purpose clause states that lots developed under the cluster method "must be connected to a community water and sewerage system, unless it can be demonstrated that at the time of subdivision a

² Correspondence received after the hearing suggests that Mr. Lo Pinto may be the joint developer of the Guzick and Lockwood tracts.

limited number of lots on a private well and septic facility within the cluster will provide a more beneficial subdivision design because of environmental or compatibility reasons." *Id.*

The Lockwood property currently is in Water Category W-6 and Sewer Category S-6. The Applicant has requested a change to Water Category W-3 and Sewer Category S-1, reflecting direct access to sewer lines and potential access to public water. This request is under review by the Washington Suburban Sanitary Commission (WSSC) and the county Department of Environmental Protection (DEP). As shown on the map depicted below (Ex. 33), two sewer lines run through the Lockwood property and public water lines are located nearby, with several possibilities for access.



1. Sewer

Two sewer lines bisect the Lockwood property, running directly through the stream valley.³ The proposed development would have easy access to these sewer lines, either through a public sewer main extension or through individual house connections. The Applicant's land planner noted that a public sewer main extension would involve large manholes and a fairly inflexible design. However, both the Applicant's planner and Technical Staff observed that installing five separate sewer house connections through the wooded stream buffer could create undesirable environmental damage. Accordingly, Technical Staff urges and the Applicant intends to pursue providing sewer connections on the adjoining Guzick property to the north where possible, and/or clustering sewer connections from the individual homes to the sewer lines, to reduce the disturbance to wetlands, stream channels and stream buffers. The final plan for these connections would be subject to review by WSSC, DEP and the Planning Board.

2. Water

Water lines are located in the right-of-way of three roads near the subject site: Barn Ridge Drive, Laughlin Lane (slightly south of the site), and Norbeck Road. In considering possible connections, the development team sought to minimize the distance traveled, the impact to the property, and the impact to the environment and adjacent properties. In addition, one of the team's goals was to provide a single water line extension that would serve both the Guzick and the Lockwood properties, to minimize harm to the properties and their sensitive environmental features.

All three of the possible connections would require the acquisition of land or an easement, either by agreement with the property owner or through condemnation by WSSC.

³ These lines apparently were installed during an era when the sensitivity of stream beds and buffer zones was not widely recognized.

Connecting to the Laughlin Lane water line would require crossing the largest amount of land. Connecting to lines in either Laughlin Lane or Norwood Road would require crossing through the stream valley that runs along the southern boundary of the Lockwood property, and then potentially crossing a second time to serve development sites on both sides of the north-south stream bed. Accordingly, the team concluded that the most economical and environmentally appropriate approach was to connect to the Barn Ridge Drive water line.

Negotiations to connect with the Barn Ridge Drive line by acquiring an easement over Parcel 602 appear likely to lead to an agreement – the owner is more amenable to the temporary disturbance of installing an underground water line than to the permanent encroachment of a private drive. Agreement with the owner of Parcel 602 would allow installation of a water line connection that would run through Parcel 602 to the Guzick property and thence to the Lockwood property. That connection could serve all the development proposed on the Guzick property, plus the two homes proposed east of the stream on the Lockwood property, without any stream crossing. Bringing public water to the three lots proposed on the Lockwood property west of the stream would require an underground stream crossing, which necessarily would disturb the stream bed.

The Applicant recognizes that negotiated access to the Barn Ridge Drive water line is not certain. Should negotiations fail, a condemnation action by WSSC could take a significant period of time. Moreover, further analysis of environmental impact may result in the conclusion that using private wells on the Lockwood property, or at least on lots west of the stream, would be more advantageous from an environmental perspective. This possibility is anticipated in the Zoning Code. Accordingly, the Applicant's request for a water category change included a request for approval of private wells on the Lockwood property, at least as an interim measure and potentially on a permanent basis.

G. Schools

The maximum number of homes permitted on the Lockwood property under LDRCD zoning would generate approximately one elementary school student, one middle school student, and one high school student. The site would be served by Sherwood Elementary School, Farquhar Middle School and three consortium high schools, James Hubert Blake, Paint Branch and Springbrook.

H. Roads

The subject site is currently landlocked, i.e. there is no public roadway that connects or is contiguous to the site. The nearest public roads that offer the opportunity for access are Westminster Drive to the northeast and Barn Ridge Drive to the northwest/west.⁴

The Applicant presented persuasive evidence that good faith efforts were made to obtain access via Barn Ridge Drive, but without success. As shown on the map below, Barn Ridge Drive begins at Norbeck Road and curves around through the Norbeck Knolls subdivision to its terminus, due north of the Lockwood Property. Testimony at the hearing indicated that it is a wide, well-maintained road. Several residential lots located east of the Guzick property and north of the Lockwood property, one of which is contiguous to the Lockwood property, have access to Barn Ridge Drive by way of pipestem lots and cross-easements that support a shared, private driveway extending south from Barn Ridge Drive. This private drive runs north-south, a short distance from the eastern property line of the Guzick property, until it reaches the northern edge of the Lockwood property, then turns east. Efforts were made to secure permission to access that private drive for development of the Guzick property, but one or more of the parties with ownership interests in the private drive refused to allow additional

⁴ Norbeck Road is quite close to the southeast corner of the Lockwood property, and Laughlin Lane is fairly close to the southwest corner of the property. However, it does not appear to be possible to access the subject site from either Norbeck Road or Laughlin Lane without cutting directly through residentially developed lots.

connections to be made. Similarly, overtures by the contract purchaser in the present case to the parties with ownership interests in the drive were met with negative responses and, in at least one case, overt hostility.

The contract purchaser in the present case also explored the possibility of creating a new connection to the terminus of Barn Ridge Drive, which abuts a parcel immediately north of the Guzick property identified as Parcel 602. This connection would involve either extending Barn Ridge Drive over Parcel 602 to the Guzick property, or constructing a private drive from the existing terminus of Barn Ridge Drive, through Parcel 602, to the Guzick property. Either of those approaches would have allowed both the Guzick and Lockwood properties to connect to Barn Ridge Drive via a shared, private drive extending north from the Lockwood property, across the Guzick property. That possibility proved fruitless, however, because the owner of Parcel 602 ultimately declined to allow it.⁵

The Applicant's only real possibility for access at this time is to connect with Westminster Drive via the Guzick property. As noted above, roadway and utility access are being planned jointly for the two properties. Access is to be secured by extending Westminster Drive approximately 150 to 175 feet to the east, where it would terminate in a cul de sac. Two driveways would extend off that cul de sac. One would run due south to serve development on the Lockwood property west of the stream, while the other would cross over the stream on a bridge and serve development east of the stream on both the Guzick and Lockwood properties. The project planner

⁵ The record lacks discussion of one other possible connection to Barn Ridge Drive that is suggested by a review of the parcel map: construction of a new connection to Rebecca Court, which has access to Barn Ridge Drive west of the Lockwood property. My review of the documentary evidence suggests two reasons why such a connection would not be feasible: (i) it would require crossing residentially developed lots that were not designed for shared driveway usage, and (ii) it would require traversing the steepest portion of the Lockwood property, which has slopes in excess of 25%.

testified that homeowners' association documents for the Guzick development can be expected to specify that the private drive is planned to extend farther south to serve two lots on the Lockwood property. The proposed configuration of these driveways is depicted on the "Concept Plan" reproduced on page 12.

Connecting to Westminster Drive would give the Lockwood property access to Batchellors Forest Road and from there to Doctor Bird Road, to the north, and Georgia Avenue to the east. Westminster Road is not a designated master plan roadway. It is a local county road serving some 10-12 homes, with a 60-foot right-of-way and one 20-foot travel lane. The posted speed limit is 25 miles per hour.

Batchellors Forest Road is classified as a primary roadway under the *Olney Master Plan*, and is slated for improvement to eliminate sharp curves and provide a direct intersection with Olney-Sandy Spring Road. Since the adoption of the Master Plan in 1980, this road has been granted Interim Rustic Road status, consistent with its current condition as a narrow, winding roadway with large trees less than two feet off the pavement. A one-lane bridge exists roughly half way between Georgia Avenue and Olney-Sandy Spring Road. The road was described during the hearing as "a poorly maintained rural road" with at least two points where one car must yield to another to get by. The posted speed limit is 25 miles per hour.

Doctor Bird Road is classified as a major highway, and is proposed for improvement under the Master Plan to a 120-foot right-of-way with two lanes. The posted speed limit is 40 miles per hour. Georgia Avenue is a five-lane divided roadway with a 150-foot right-of-way recommended in the Master Plan. The posted speed limit is 50 miles per hour.

I. Traffic

The Technical Staff report stated that the five single-family dwellings permitted on the subject site under LDRCD zoning would be considered to generate a total of three vehicle trips in each of the morning and afternoon peak hours. Technical Staff opined that the existing local area road network could accommodate this small increase in traffic. Staff also noted that this trip generation would represent a decrease in traffic from the level expected under the current zoning; under RE-2 zoning, a maximum of 14 single-family dwellings could be built on the subject site, which would generate seven morning and seven afternoon peak hour trips.

The project planner testified that a single-family residence typically is considered to generate 1.1 trips in the peak hour. Thus, the five homes permitted on the subject site under the LDRCD Zone would generate five peak hour trips, which would have an imperceptible effect on the local road network. The Hearing Examiner finds it unnecessary to determine whether Technical Staff or the project planner has more accurately estimated the number of trips that would be generated, given that the estimates are very close, and that even the larger number was found to have an imperceptible effect on traffic conditions.

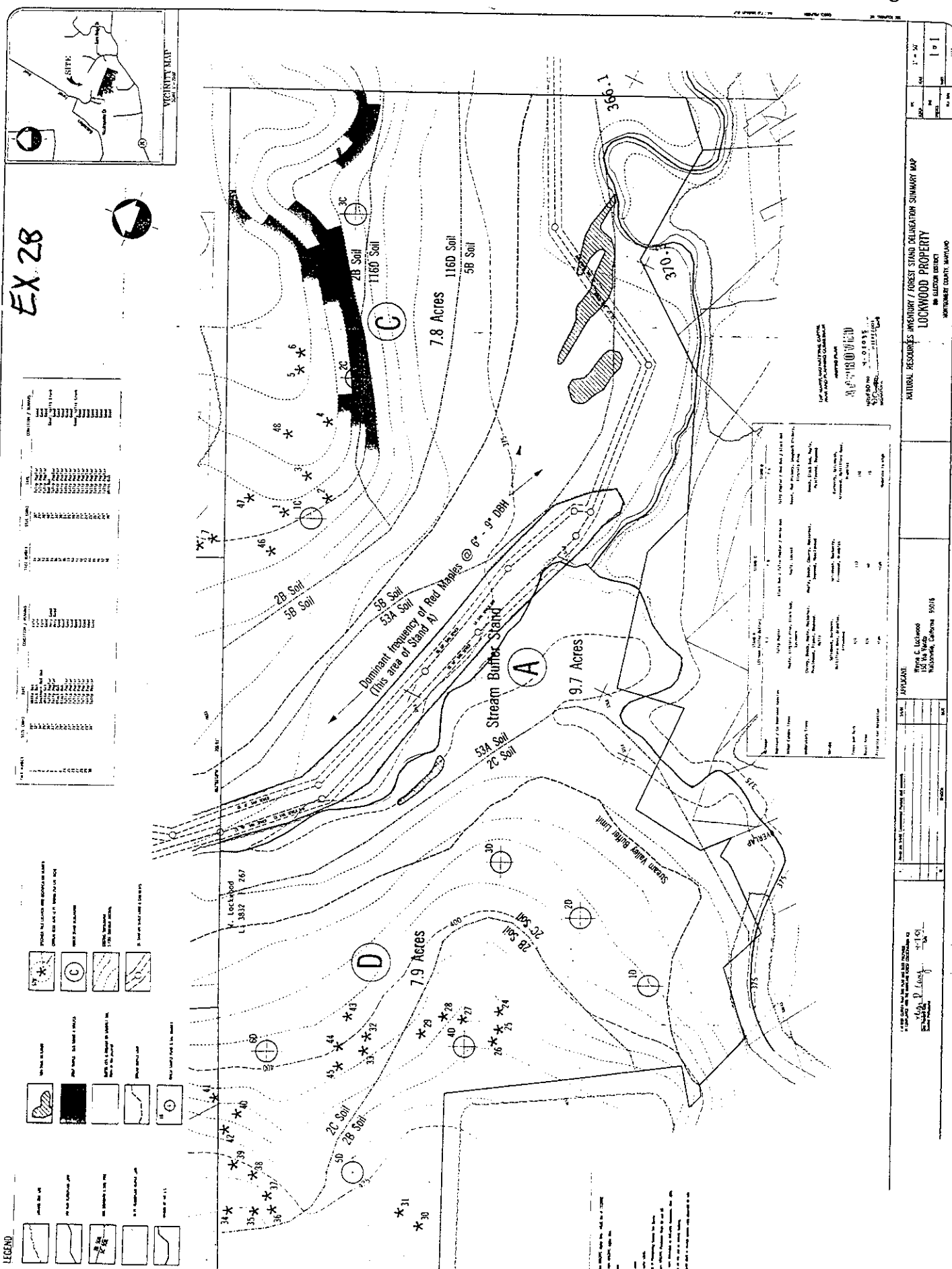
One letter submitted in opposition to the application stated that the proposed development would have a substantial impact on traffic. Traffic was also addressed by the only party who spoke in opposition to this application at the hearing, a resident of Westminster Drive, Mr. Stephen Lumpkin. Mr. Lumpkin expressed grave concerns about additional traffic on Westminster Drive and Batchellors Forest Road, and deep frustration that the proposed development could not connect to Barn Ridge Drive instead. He described driving conditions on Batchellors Forest Road as difficult, and opined that adding even one new driver to the local road network would tax the system. Under questioning by Mr. Lumpkin, the project planner reiterated his opinion that adding the eight

households proposed in the Guzick and Lockwood developments would not produce a perceptible impact on traffic along Batchellor's Forest Road, despite its condition. I find that the preponderance of the evidence, as presented by Technical Staff and the project planner, indicates that the increased traffic from the proposed development would not have an adverse effect on the local roadway network.

A separate issue is raised by the requirements of Policy Area Review under the County's Annual Growth Policy (AGP). Under the Fiscal Year 2002 AGP, the Olney Policy Area has insufficient transportation capacity to support the queue of pending residential development. As a result, the proposed Lockwood development would have to satisfy applicable requirements at subdivision through one of two methods: (i) meeting the definition of a *de minimis* development by reducing the number of homes proposed to four, which would generate less than the five-trip level defined as *de minimis*; (ii) funding capacity increasing major road improvements, or (iii) developing some form of trip mitigation acceptable to the Planning Board.

J. Environment

A Natural Resources Inventory/Forest Stand Delineation (NRI/FSD)(#4-02035) has been approved for the subject site and is depicted on the following page. The site is entirely wooded, with the exception of stream valleys and small areas of wetlands. If the requested rezoning is granted, the applicant must comply with regulations in the *Technical Tree Manual* and the *Montgomery County Environmental Guidelines* at the time of preliminary plan and subdivision. In particular, Technical Staff recommends that the Applicant's Forest Conservation Plan should show what protection is provided for the site's steep, forested slopes outside the stream valley buffer. Approval of a final Forest Conservation Plan would be required prior to release of sediment and erosion control or building permit, as appropriate.



This site is located within the Batchellors Forest tributary of the Northwest Branch watershed. The Countywide Stream Protection Strategy (CSPS) assesses Batchellors Forest tributary as having good stream conditions and good habitat conditions, labeling it as a Watershed Protection Area – remedial level. The stream channels have been destabilized by past erosion and accelerated downcutting associated with land clearing activities without adequate best management practices, such as the use of forested buffers. Technical Staff recommends that sewer connections for individual lots be clustered together to minimize stream crossings, and that stream bank restoration be considered for those areas disturbed by stream crossings.

III. SUMMARY OF TESTIMONY

The testimony is grouped according to the Applicant's case in chief, opposition's case in chief, correspondence in support, correspondence in opposition, and People's Counsel.

A. Applicant's Case in Chief

1. **Wayne Lockwood**, Applicant.

Mr. Lockwood is 50% owner of the subject property. He has held his ownership interest for 21 years and his father held it before him for some 10 years. The property is currently under contract for sale to Mr. Robert Lo Pinto. Mr. Lockwood stated that he has not previously sought rezoning of this property, nor has he previously filed any development plans for it. He expressed regret that when Barn Ridge Drive was under development he did not seek access through it to his property. He assumed that the neighbors would cooperate because he did not object to development of their properties.

2. **Robert Lo Pinto**, contract purchaser.

Mr. Lo Pinto testified that he lives in Silver Spring less than one mile from the subject site. He plans to have a personal residence at the subject site. In working with the engineers and other

consultants, he has advised them to cluster the lots to preserve undisturbed space. He also instructed them to work very hard to reach out to the neighbors, as well as to make sure that this will be a beautiful project and not one that just technically meets the legal criteria. To that end, he and his team have had meetings on-site and off-site with some of the neighbors, including the Southeast Rural Olney Civic Association (SROCA). They also have contacted the adjacent property owners and held separate meetings with them right in the neighborhood. He testified that overall they have had good support, especially from some of the neighbors along Norbeck Road who have lived in the area for many years. He stated that he has reached out actively to neighbors along Barn Ridge Drive and received a very negative response from one neighbor in particular, Ms. Vacchio. He noted that in one instance a notification letter to Ms. Vacchio and her husband concerning a neighborhood meeting about the project was returned with the notation on the bottom "please do not contact us about this again. We will not accept further correspondence from you." (Ex. 25).

Mr. Lo Pinto stated that he attempted to gain access over private property west of Barn Ridge Drive (Parcel 602) to extend Barn Ridge Drive and/or bring a separate private drive onto the Lockwood property. The current owner of the property considered the proposal and viewed plans, but ultimately rejected the extension of Barn Ridge Drive across his property. That property owner is, however, participating in negotiations about extending the water line from Barn Ridge Drive to the Lockwood property. When their attempts to gain roadway access to Barn Ridge Drive failed, Mr. Lo Pinto and his team turned to the Guzick property for access via Westminster Drive. They have worked in close cooperation with the Guzicks on that access.

Mr. Lo Pinto stressed that with the exception of the access issue, he has tried not only to stay within the guidelines but to make the proposal a development that people would be happy to live in and the neighborhood would be happy to have, and one that is very respectful of the environment. On

questioning by Martin Klauber, the People's Counsel for Montgomery County, Mr. Lo Pinto stated that during their meeting with the SROCA comments were mostly positive. Questions were raised concerning the stream crossing necessary to have access to developable portions of the site. However, after the meeting, Mr. Lo Pinto received no further response or comment from any of the neighbors who were members of any of the civic associations. Mr. Lo Pinto's team held two meetings in the area of the subject property, and invited all owners of property adjacent to either the Guzick property or the Lockwood property. They held two separate meetings to accommodate all of the people they thought might attend, however, only four or five neighbors attended those meetings. All were in support of the plan.

3. Alfred Blumberg, site planner.

Mr. Blumberg was designated an expert in land use planning. He provided a description of the size and shape of the property, its location relative to nearby roads, and its environmental features. Mr. Blumberg confirmed Mr. Lo Pinto's testimony that efforts to obtain access to Barn Ridge Drive over private property were unsuccessful.

Mr. Blumberg discussed in some detail the definition of the "surrounding area" for the subject property. He described the differences between the surrounding area he proposed, extending from slightly west of the site north to Batchellors Forest Road and Doctor Bird Road, and the surrounding area proposed by Technical Staff, which extended from slightly east of the site west to Georgia Avenue. He opined that the most appropriate "surrounding area" is probably the area of overlap between the Applicant's and Technical Staff's proposed areas. He also was amenable, however, to the suggestion by the People's Counsel that for analysis purposes, the surrounding area should extend south of Norbeck Road. Moreover, he opined that the proposed Lockwood development

would be compatible with any of the “surrounding areas” proposed – his original proposal, the Technical Staff’s, or Mr. Klauber’s.

Mr. Blumberg noted that the subject site is in the southeast quadrant of the *Olney Master Plan* area, in an area identified as Rural Residential in the Proposed Land Use portion of the Master Plan. The Master Plan recommends RE-2 zoning for the rural residential area. It also includes a parenthetical phrase: “Property owners may request Rural Cluster Zone. See Text.” The text of the Master Plan recommends maintaining as much of the open space and rural character as possible in this area. Mr. Blumberg described the proposed Lockwood development as consistent with the Master Plan because it would implement rural cluster zoning, which would reduce the maximum density from 14 dwelling units to five. This would preserve more of the open space and environmentally sensitive areas associated with stream valley buffers, as well as making access to public sewer and water legally possible. Mr. Blumberg explained that the County Council adopted the LDRCD Zone in 1995 in order to create a floating zone option for landowners to take advantage of the clustering recommendation stated in the Master Plan. Prior to creation of the LDRCD Zone, the only avenue for rural cluster development was the Rural Cluster Zone, which is a Euclidean zone that requires proving change or mistake to obtain rezoning.

Mr. Blumberg then presented a non-binding Concept Plan for the development, reproduced on page 12, which shows the current plan for construction of five residential dwellings on the site. The Concept Plan also shows how access could be provided through the Guzick property. Mr. Blumberg described the joint planning process that has been developed for the Guzick and Lockwood properties to comply with the county requirement that each lot must have frontage on a public street. The plan would extend Westminster Drive in an easterly direction for 150 to 175 feet, terminating in a cul-de-sac. Each of the lots on the Guzick and Lockwood properties would then have a driveway

which reaches that cul-de-sac. As long as the driveway has frontage on a public street, Mr. Blumberg stated that the lot is considered to have frontage on a public street. This would be accomplished through two shared private drives, one on each side of the stream, one of which would serve homes on both the Guzick and Lockwood properties. Upon additional questioning, Mr. Blumberg noted that it is not common to have shared driveways crossing two different subdivisions, but it has been done before. The intent is that the homeowners' association documents for the Guzick property, which will be developed well before any homes could be built on the Lockwood property, would anticipate extension of the driveway through the Guzick property to include two additional lots on the Lockwood property.

Mr. Blumberg stated that 62% of the total site area would be outside the individual lots, under common ownership through a homeowners association. This would include a 50-foot strip of permanent open space between the edge of the lots and the contiguous property to the north. This land would be placed under a forest conservation easement to provide a permanent buffer between existing homes and the new development. Mr. Blumberg conceded that the majority of the trees presently on the site are deciduous, therefore during wintertime the existing homes would have a view of some of the proposed homes on the Lockwood property, despite the 50-foot buffer.

The LDRCD Zone specifies a minimum lot size of 40,000 square feet. Mr. Blumberg noted that the lot size planned for the Lockwood property on the non-binding Concept Plan is a minimum of two acres. The larger lot size was selected to ensure compatibility and an appropriate relationship with the surrounding residences, all of which are on lots of at least two acres. Under this plan, the Lockwood property would be developed with houses on large, wooded lots, just like the surrounding properties. Moreover, taking into account the woodlands that would be preserved within these individual lots on the Concept Plan, more than 80% of the total site would be retained in its existing forested condition.

Mr. Blumberg next discussed compliance with the purposes of the LDRCD Zone. One element of that purpose is that the zone is appropriate for sites “which may be served by community water and sewer.” Mr. Blumberg noted that the property is bisected by public sewer lines which may be used for this development. In addition, he categorized current negotiations with a nearby property owner to bring public water to the site as favorable. He noted that if public water is not available, wells may be used on an interim or even permanent basis consistent with the purposes of the zone. On the west side of the stream in particular, it is possible that gaining access to public water would have a greater environmental impact than using wells. The purpose clause for the LDRCD Zone permits the use of wells permanently in such circumstances.

Mr. Blumberg opined that the proposed development also satisfies the other elements of the purpose clause:

- (i) It would not exceed the maximum density specified.
- (ii) It would serve the function of providing a buffer or transitional use between surrounding residential uses.
- (iii) The preservation of the stream valley on the site would be an important contribution to conserving a sensitive environmental area.
- (iv) The preservation of the stream valley buffer and at least 60% of the open space would further the protection of scenic and sensitive environmental resources.
- (v) The proposed development would preserve the rural character of the site as viewed from areas visible to the community, through the use of two-acre lots, the preservation of forested land, and the wooded buffer around the edge of the development, which would largely preserve the views from neighboring properties of trees on the Lockwood property:

Mr. Blumberg further opined that the proposed development would comply with the purpose, intent, and guidelines applicable to the optional cluster method for the LDRCD Zone.

(a) The proposed development would protect scenic and environmentally sensitive areas without jeopardizing farming or other agricultural uses, since no agricultural uses exist in the immediate vicinity of the site.

(b) The proposed development would preserve at least 60% of the property as open space.

Mr. Blumberg also opined that by virtue of its low density, large, wooded lots, and protection of sensitive environmental areas of the site, the proposed development would satisfy the guidelines specified in the Zoning Code for the cluster method of development under the LDRCD Zone. Most of the guidelines would be satisfied simply by the relationship of the Concept Plan layout to the site's natural features. With regard to the guideline that a plan of cluster development "must show how scenic vistas are being preserved or enhanced" and consider the visual impact of the proposed development on such vistas, Mr. Blumberg identified two relevant vistas: the vistas of the people who would live in the proposed development, and the vistas of those who currently live adjacent to the property. He stated that the Concept Plan would preserve the neighbors' vistas because of the wooded buffer areas around the perimeter of the property, which would preserve the existing views of woods on the site. In addition, the large amount of permanent open space in woods and stream valley shown on the Concept Plan would preserve the vistas within the site for new residents.

Mr. Blumberg next testified as to the traffic effects of the proposed rezoning. He noted that the Annual Growth Policy defines *de minimus* traffic generation as generating less than five trips in either the a.m. or p.m. peak hour. Typically, a single-family residence is considered to generate 1.1 trips in the peak hour. So under the *de minimus* regulations of the AGP, a development with a

maximum of four residences would be considered to have a *de minimus* effect. Under the FY 2002 AGP, the Olney Policy Area does not have adequate ceiling capacity for five residences. If this project were to go to subdivision approval and the AGP ceiling had not changed, the project would have to be modified to permit only four residences in order to meet the *de minimus* requirement for subdivision. Alternatively, the Applicant might be able to mitigate the additional traffic by funding roadway improvements that would add capacity to the area, or other transportation improvements approved by Technical Staff. The procedure would be the same if the property were developed under the existing RE-2 zoning, except that the traffic generation would be much greater with the 14 units permitted under the RE-2 Zone.

Local Area Transportation Review (LATR) is not required for this proposal because the anticipated traffic generation is considerably less than 50 trips in the peak hour; that would also be the case if the property were developed under the RE-2 Zone. Because LATR is not required, Mr. Blumberg could not offer any information in response to a query concerning the critical lane volume at Batchellor's Forest Road and Westminster Drive. Nonetheless, Mr. Blumberg opined that from a practical standpoint, putting aside the technical requirements of policy area review, the additional traffic from four or five units on the Lockwood property would be imperceptible in the surrounding area.

In response to questioning by other parties, Mr. Blumberg stated that the 28 acres on the Lockwood property could, in theory, be divided into 14 two-acre sites under the existing RE-2 zoning. That would require subdividing the entire property into lots, including the stream valley buffer, and placing forest conservation easements on a portion of each lot. In addition, percolation tests have not been done on the property so it is not clear whether all 28 acres could support two-acre lots with well and septic systems.

In response to questioning from a resident of Westminster Drive, Mr. Blumberg stated that the additional traffic from seven or eight households on the Guzick and Lockwood properties would produce no perceptible impact on traffic along Batchellor's Forest Road. He stated that access via Barn Ridge Road might be preferable if it were feasible, but declined to agree with the suggestion that it certainly would have been preferable.

Mr. Blumberg conceded that when the County Council considers the proposed rezoning, the only assurances that the rural character of the property would be maintained and that the perimeter treatment and stream valley protection would be as described in this record is the required review by the Planning Board of the site plan and subdivision plan. The optional method of development with a binding schematic development plan is not available for rezoning to the LDRCD Zone. As a result, the Concept Plan described in this hearing is not binding on the Applicant.

When asked what advantage the Applicant would gain from obtaining the requested rezoning, Mr. Blumberg replied that the primary advantage is access to sewer lines, which is not permitted in the RE-2 Zone.

4. Jeffrey Lewis, engineer.

Mr. Lewis was designated as an expert in civil engineering. He described his role at this stage of the project as examining the plans for extraordinary engineering issues unique to the site that may make the site undevelopable or impose a hardship either on the environment or on the developer. He stated that given the large amount of open space required in the zone requested, this project would easily meet or exceed forest conservation requirements, as well as satisfying any storm water management issues that might arise during subdivision review.

Mr. Lewis described in some detail the stream crossing that is proposed for the private drive from the new Westminster Drive cul de sac, across the Guzick property, onto the Lockwood

property. The crossing would be a single driveway crossing over the Northwest Branch Stream in the form of a bridge, rather than a culvert – the driveway would be a straight span from top of bank to top of bank, with no footings inside the stream channel. The crossing as currently envisioned would be approximately 25 feet from top of bank to top of bank, which is well within the range of a typical small bridge, and could be fairly low, in keeping with the character of the stream channel habitat.

Mr. Lewis then discussed access to water and sewer lines. He identified the existing water line closest to the property and existing sewer lines on the property. He described the water line extension that would be needed to bring public water service to the Lockwood property east of the stream, and the possibility of a secondary stream crossing to serve homes on the east side of the stream. Mr. Lewis confirmed earlier testimony that the most economical and environmentally sound option would be an extension from the water line that runs along Barn Ridge Road. He also confirmed that current negotiations with the relevant property owner suggest a good possibility of gaining the necessary access. Mr. Lewis further stated that the bridge structure planned for the private drive would not allow a crossing at the same location for water purposes. Disturbance to the stream could be minimized, however, by making the additional crossing in the vicinity of the bridge.

Mr. Lewis described two possible methods of gaining access to the sewer lines. One would be a public sewer main extension, which involves a WSSC-maintained sewer with large manholes and fairly inflexible design. The other option, which Mr. Lewis hopes will be approved, is constructing individual sewer house connections. Those would allow the use of smaller, more flexible pipes, and possibly combining sewer house connections so that the seven homes on the Guzick and Lockwood properties would be served by a total of three or four connections, reducing the total disturbance. The sewer connection plan would be reviewed by the Planning Board as part of the preliminary plan and site plan review.

The Applicant's request for water and sewer category changes is under review by WSSC and the Department of Environmental Protection. The request for a category change also discussed the possible need for wells as an interim or potentially a permanent means of water access. Mr. Lewis explained that the need for WSSC to use its condemnation power would be one factor in the ultimate decision as to whether these properties should be served by well water or public water. Other considerations are the environmental impacts of each of the possibilities. Mr. Lewis noted that the use of interim wells was approved on the Guzick property. Finally, he concluded by opining that the proposed development would more than meet the forest conservation requirements on this site, and that the application meets the standards for rezoning from the standpoint of civil engineering matters.

B. Opposition's Case in Chief

Mr. Michael Lumpkin, a resident of Westminster Drive in the immediate vicinity of the subject site, spoke about his concern regarding the proposed access to the Guzick and Lockwood properties. He stated that he believes access from Barn Ridge Road would be much easier and more logical than from Westminster Drive, given the shorter distance to Barn Ridge Road and the fact that a paved drive already exists from Barn Ridge Road to the vicinity of both the Guzick and Lockwood properties. Mr. Lumpkin stated that it seems contrary to the whole idea of land and habitat preservation promoted by the low density cluster method to create access requiring a bridge over a waterway, thereby destroying wooded areas and habitat. Mr. Lumpkin advocated the use of eminent domain by the County to achieve the easier and more logical access route, stating that just because the original planning commissioners or councilmembers failed to provide for this access that is no reason to punish the current landowners. Instead, the oversight should be corrected by extending Barn Ridge Road to these properties.

C. Correspondence in Support

The record contains three brief letters submitted by neighboring landowners in support of the application. I note that all three letters state that the writer has “seen the development plans” and is in favor of the development, suggesting that the support was given based on the non-binding Concept Plan. I note, in addition, that only one of the letters was written by a person who actually resides on the neighboring property he or she owns; one letter was written by the owner of contiguous property that connects to Rebecca Court but appears to be undeveloped, while another is from the Guzicks, who own the contiguous property to the north but reside in another State.

D. Correspondence in Opposition

The record contains one letter in opposition to the application (Ex. 39).⁶ This letter is from Maria Vacchio and Joseph Myers, owners and residents of the Barn Ridge Drive property (lot 18 of the Norbeck Knolls development) that is contiguous to the Lockwood property. Ms. Vacchio and Mr. Myers have refused to communicate with Mr. LaPinto, the contract purchaser of the Lockwood property, and did not attend the public hearing in this case. Ms. Vacchio submitted a letter on the day of the hearing, however, requesting that the record be held open for two weeks after the close of the hearing to allow her to review the hearing transcript and file a written response. Her letter did not state why she was unable to attend the hearing and offer her testimony in person. Nonetheless, in the interest of fairness and with the Applicant’s consent, the record was held open as requested.

⁶ The Applicant notes that Ms. Vacchio’s letter was date-stamped by this office on January 3, 2002, one day after the announced deadline of January 2, 2002. The letter was dated January 2, 2002 and in fact arrived at the Hearing Examiner’s office in the early morning mail delivery on January 3, 2002. Thus, the letter very likely arrived at the County Council Office Building on January 2. Given that this slight degree of tardiness caused prejudice to no one, the letter was accepted into evidence.

Ms. Vacchio⁷ raised a number of substantive issues in her comments, and the Hearing Examiner would have found it helpful to have Ms. Vacchio available at the hearing to examine her views and allow meaningful cross-examination. The Hearing Examiner also would have had the opportunity at the hearing to ask related follow-up questions of the Applicant. Lacking these opportunities, I have assessed the credibility and weight of Ms. Vacchio's comments in light of the entire record, including specific written submissions made in reply by the Applicant and the owners of the Guzick property, which refute many of Ms. Vacchio's factual assertions. *See* letter dated January 10, 2002 from counsel for the Applicant (Ex. 42), letter dated January 7, 2002 from Karen and Dean Guzick (Ex. 41). Ms. Vacchio's letter is summarized below. Where contrary factual information was provided by the Applicant or the Guzicks, that information is cited in italics. The legal import of Ms. Vacchio's assertions will be discussed further in Part IV, Zoning Issues, below.

1. Ms. Vacchio purchased her property at 17001 Barn Ridge Drive in 1987. She understood at that time that the Guzick and Lockwood properties were undevelopable because they were located on landlocked floodplain, adjacent to a protected stream, and because they lacked the percolation characteristics necessary to support development with a well and septic system.

Ms. Vacchio cites in support for her conclusion that the Lockwood property cannot be developed under the current RE-2 zoning: (i) real estate appraiser E.L. Dieudonne, Jr, who testified at the public hearing on the Guzick rezoning that the tax assessment on the Lockwood property had been lowered because it could not be developed; and (ii) the statement by Technical Staff in its report on the Guzick property that the high water table on the Guzick property, contiguous to the Lockwood property and at a higher elevation, precluded the use of septic systems.

⁷ I attribute the comments to Ms. Vacchio alone for ease of reference and because the document bears only her signature.

The Guzicks note that their property is not landlocked, as it abuts the terminus of Westminster Drive. They also assert that their property was tested by the County Health Department in 1985 and passed percolation tests, indicating that development with a septic system might be possible. The Technical Staff's report in the Guzick case asserted that the property might not be able to maintain a septic system; to conclude from this that that no part of the Lockwood Property could maintain a septic system is too great a leap to sustain logically. (See Part IV, Zoning Issues, for discussion of the limited relevance of this issue.)

As characterized in the Hearing Examiner's Report and Recommendation on the Guzick rezoning, G-732 (see Report and Recommendation at 13-14), Mr. Dieudonne's testimony did not indicate that the Lockwood property could not be developed. Rather, Mr. Dieudonne stated that the Lockwood property could not be developed under RE-2 zoning without obtaining access through the Guzick property.

2. A review of public records revealed that Mr. Guzick had declined to obtain an easement offered to him by Ms. Vacchio's builder, assuring that Mr. Guzick would not obtain access to his property via Ms. Vacchio's. Ms. Vacchio states emphatically that she and other property owners along Barn Ridge Drive will not allow access for the Guzick and Lockwood properties.

The Guzicks assert that they negotiated with the builder of Ms. Vacchio's development to acquire an easement for access to Barn Ridge Drive. The developer was amenable to such an agreement, and a price was negotiated. However, before the agreement was recorded, one of the individual lots with access to the private drive was sold, requiring the consent of the new owner. This property owner, a Mr. Linatas, refused to agree to the easement.

3. No evidence was presented that the owners of the Lockwood property would suffer any loss if the property remained undeveloped, moreover, they paid nothing for the property.

4. Neither Mr. Lockwood nor anyone on his behalf ever contacted Ms. Vacchio. The only contact made by Mr. Lo Pinto was through certified letters that required a trip to the post office, even after Ms. Vacchio made it clear that she would not cooperate with his efforts to develop the Guzick property. He never mentioned the Lockwood property.

The Applicant states that Mr. Lo Pinto, as a representative of the Applicant, sent a letter to Ms. Vacchio by certified mail, dated June 22, 2001, inviting her to a meeting to discuss development of both the Guzick and Lockwood properties. Ms. Vacchio acknowledged receipt of the letter by sending the letter back to Mr. Lo Pinto, with a handwritten notation along the bottom indicating that she did not wish to be contacted again. (Ex. 25).

The project planner sent Ms. Vacchio the informational notice forwarded to all adjacent and confronting property owners when the current rezoning application was filed. In addition, Ms. Vacchio was included on the mailing list for the Notice of Hearing sent by the Office of Zoning and Administrative Hearings on October 8, 2001.

5. Technical Staff never contacted Ms. Vacchio in preparing their report, thus, Ms. Vacchio had no opportunity to comment on it.

6. The requested rezoning is not consistent with the stated purposes of LDRCD zoning because it would allow development where none would otherwise be possible. One of the stated purposes of the LDRCD Zone is the preservation of the environment. The Applicant failed to show any environmental benefit to the proposed rezoning. Batchellors Run would be contaminated by runoff from any development on this site. The open space that would be preserved on the site is already protected, so the rezoning would not create any additional protection. In addition, this open space necessarily lies in the flood plain, which is not readily visible to adjoining properties and will not be visible at all if development occurs. This is inconsistent with the stated purposes of LDRCD zoning.

7. The proposed rezoning is not compatible with the surrounding neighborhood. Nothing in the rezoning ensures that the property would remain forested. The Applicant's representations that forested areas would remain along the perimeter are not binding and may evaporate as the process proceeds. Thus, the vistas created by the heavily forested property would be sacrificed; even under the Concept Plan proposed, the northern wooded buffer would be only 50 feet. Moreover, the smaller lots under LDRCD zoning would be incompatible with the larger lots of two or more acres in the Norbeck Knolls development, and would not serve the purpose of the LDRCD Zone to preserve the rural character of property.

The Guzicks point out that nothing ensures that the property would remain forested under current zoning, either. They note that agricultural uses are permitted under the RE-2 Zone, authorizing them to clear-cut their property and raise pigs and chickens on it.

8. The proposed development would have a substantial impact on traffic, and would create pollution and noise.

Because the Lockwood property has been denied access to Barn Ridge Drive, any traffic impacts created by the proposed development would neither pass Ms. Vacchio's property nor travel the streets serving her property.

E. People's Counsel

Martin Klauber, Esquire, People's Counsel, gave his support for this application, recognizing that the property is landlocked and that the record reflects efforts to secure alternative road access. Mr. Klauber expressed one serious concern, in the form of a recommendation that the basic intent of the LDRCD Zone would be well served by a text amendment that permits an applicant for the zone to file a schematic development plan. Mr. Klauber described the purpose clause provisions of this

zone as tailor-made for the Optional Method of Application that includes a schematic development plan.

IV. ZONING ISSUES

The LDRCD Zone is designed as a floating zone. It contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as number of lots, building location, and determinations about protection of environmentally sensitive areas and preservation of open space. The application of the zone to the subject property involves an evaluation of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause

The LDRCD Zone contains a purpose clause that keys the suitability of the proposed location to conformity with the local master plan. The purpose clause is found in § 59-C-9.25 and contains the following evaluation factors:

It is the purpose of the Low Density Rural Cluster Development Zone to implement the general plan for the Maryland-Washington Regional District and the local area master plan by permitting well designed development consistent with the density proposed by the local area master plan. It is also the purpose of the Low Density Rural Cluster Development Zone to provide suitable sites for low-density residential development which may be served by community sewer and water service at locations designated: a) for development at densities not more than one unit per 5 acres by an approved and adopted master plan; b) for a buffer or transitional use between agricultural areas and low-density one-family uses and between 2 higher density developments; c) for conservation of a sensitive environmental area; d) for protection of scenic and sensitive environmental resources and the preservation of existing open space or agricultural areas. Under this zone, the general plan or area master plan can be implemented in a manner and to a degree more closely compatible with County plans and policies than otherwise possible.

The Low Density Rural Cluster Development Zone is intended to provide the maximum amount of freedom in lot size and design in order to permit the greatest amount of open space to be conserved, and to prevent

detrimental affects [sic] on the environment. The open space should be appropriately located for agricultural preservation, environmental protection, and preservation of the rural character as viewed from areas visible to the community. Therefore, to meet this objective the optional standards, guidelines, and requirements of Section 59-C-9.5 apply in this zone. In addition, the lots developed under these provisions must be connected to a community water and sewerage system, unless it can be demonstrated that at the time of subdivision a limited number of lots on a private well and septic facility within the cluster will provide a more beneficial subdivision design because of environmental or compatibility reasons.

The fact that an application complies with all the specific requirements and purposes of the zone will not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses, and, in itself will not be sufficient to require granting the application.

Community opposition (see discussion of Vacchio letter in Part III.D above) contends that the application fails to satisfy the purpose clause because the RE-2 Zone at this location affords better environmental protection and the Applicant failed to show environmental benefits of the proposed development. These contentions will be addressed in sequence.

1. Environmental Protection under LDRCD Zone

The opposition asserts that development cannot be carried out on the subject property under its current RE-2 zoning classification because the site lacks the percolation characteristics necessary to maintain a septic system. (Development under the RE-2 Zone must rely on septic systems because connection to public sewer is not permitted.) As a result, the argument continues, the requested rezoning would be inconsistent with the purpose of the LDRCD Zone to protect sensitive environmental resources and existing open space, because leaving the site undeveloped would provide the highest degree of protection.

The assertion that no development is possible on the Lockwood property under RE-2 zoning is made without any substantial factual underpinning. The evidence of record is inconclusive as to whether the Lockwood property could support the use of septic systems. Moreover, the opposition's

argument assumes that current water and sewer policies and environmental regulations will continue indefinitely and prevent realization of density authorized by the RE-2 Zone. These assumptions ignore the possibility that legislative policies may change, or mitigation or other technical advances may permit development of greater density under the RE-2 Zone than is currently possible. The assumption also ignores the down side of development under the RE-2 Zone and current policies, that is, the long term risk of contamination to the high water table by use of septic systems. In any event, these external assumptions are inappropriate for evaluating the purpose clause and its master plan conformity requirement.

Any comparison between the two zones must evaluate development potential as specified by the standards of each zone. If external assumptions are not considered, the RE-2 Zone contains nearly three times the development potential of the LDRCD Zone. The RE-2 Zone is Euclidean in nature and permits development with minimum post-zoning oversight. It does not require master plan conformity. Environmental constraints on this site could be expected to impose some reduction of density under the RE-2 Zone, but the opportunities for environmental mitigation and legal constraints mean that the RE-2 Zone retains reasonable development potential. *See Steel v. Cape Corporation*, 111 Md.App. 1, 677 A.2d 634 (1996). Because of the absence of stringent post-zoning safeguards, this development potential would likely consume more open space and forestation on the site than would development under the LDRCD Zone.

The LDRCD Zone offers protection unavailable under the RE-2 Zone. For example, the LDRCD Zone would require preliminary plan and site plan review by the Planning Board. The Planning Board is delegated significant responsibilities to review achievement of site-specific development standards under Section 59-C-9.5. Open space preservation and environmental protection objectives would be monitored under the LDRCD Zone throughout the post-zoning stage. The

application of the LDRCD Zone at this location would ensure that the site is developed with no more than five lots, and perhaps less depending on the post-zoning review. This would limit potential development to a density that would conserve sensitive environmental areas, preserve scenic open space, and protect sensitive environmental resources including floodplains, wetlands, and stream valley buffer areas. The LDRCD Zone offers self-contained safeguards and protections that would survive any external policy changes. Consequently, the LDRCD Zone offers substantial environmental protection for this location.

2. No Showing of Environmental Benefit Required

In a related contention, the opposition argues that the application is inconsistent with the purpose of the LDRCD Zone because the Applicant failed to show any environmental benefit that would result from the rezoning. This contention is legally irrelevant. The purpose clause does not require an environmental impact analysis or an affirmative showing of environmental benefits at the zoning stage. Instead, the purpose clause requires master plan conformity with respect to several factors. The environmental and open space aspects of the purpose clause relate to the identification of locations deemed by the master plan to be suitable for the LDRCD Zone. The subject property clearly represents a location which conforms with master plan objectives (see Master Plan description, p. 7). It is designated for a density of not more than one unit per five acres. It can provide access for cluster development by means of a common roadway without direct access to arterial or periphery roads. It also contains sufficient land to foster more cost-effective development, conserve sensitive environmental areas, protect sensitive environmental resources and preserve substantial existing open space.

3. Consistency with Purpose Clause of LDRCD Zone

The subject property satisfies the requirements of the purpose clause, as outlined below. This analysis avoids reliance on the non-binding Concept Plan, evaluating instead the density and type of development that would be permitted on the subject site under the LDRCD Zone. The following numbered paragraphs refer to the elements contained in the first paragraph of the purpose clause.

1. First sentence. Application of the LDRCD Zone to the subject property would implement the local master plan with a well-designed development consistent with densities authorized by the plan.

2. Second sentence. The subject property has ready access to public sewer service, and a strong likelihood of access to public water service. Alternatively, the layout and environmental features of the site suggest that well water may be more appropriate, particularly west of the stream. The purpose clause anticipates the use of well water (and even a septic facility, which would not be necessary in this case) for a small number of lots by stating that it may be “demonstrated that at the time of subdivision a limited number of lots on a private well and septic facility within the cluster will provide a more beneficial subdivision design because of environmental or compatibility reasons.”

3. Clause a). The subject site is in a location designated in the *Approved and Adopted June 1980 Olney Master Plan* for development at a density no greater than one unit per five acres.

4. Clause b). No agricultural areas exist in the immediate vicinity of the site. The southeast portion of the Olney Planning Area, including the subject site, is specified by the master plan as a buffer and transition for agricultural, open space and low density residential uses. Development of the subject site under LDRCD zoning rather than its current, higher-density RE-2 zoning would contribute to the buffering effect of this area, which lies between higher density residential areas south of Norbeck Road and west of Georgia Avenue.

5. Clause c). The proposed development would contribute to conserving sensitive environmental areas by complying with the LDRCD Zone requirement that at least 60% of the site be preserved as open space. The portion of the site to be permanently preserved as open space consists in large part of stream buffer areas including floodplain, wetlands, and other sensitive environmental features, most of which would be unavailable for development regardless of zoning classification. However, the lower density permitted under the LDRCD Zone would cause less stress on these sensitive environmental areas than the higher density permitted under the current RE-2 zoning.

6. Clause d). As discussed in the previous paragraph, development of the subject site under LDRCD zoning would contribute to the protection of sensitive environmental resources. It would also protect scenic resources and open space on the site by preserving more of the existing wooded areas than would be likely if the site were developed under the current RE-2 zoning.

The second paragraph of the purpose clause for the LDRCD Zone states that the open space preserved on site “should be appropriately located for agricultural preservation, environmental protection, and preservation of the rural character as viewed from areas visible to the community.” The purpose clause then specifies that “to meet this objective the optional standards, guidelines, and requirements of Section 59-C-9.5 apply in this zone.” The provisions of Section 59-C-9.5 primarily assess whether the designation of dwelling sites and open space as proposed would be adequate to protect agricultural activities, the natural integrity of sensitive environmental areas, and significant scenic vistas. The section also contains development standards that establish parameters for features such as lot size, setbacks, and building height.

Site-specific determinations about how the property would be developed and how the development would achieve the environmental and open space objectives of the zone are implemented through post-zoning oversight as specified by the detailed regulations contained in Section 59-C-9.5.

The Concept Plan and the Applicant's representations at the hearing suggest that the proposed development would satisfy the requirements of Section 59-C-9.5. A complete analysis, however, must be made by the Planning Board in the event that the requested reclassification is approved.

The Applicant demonstrated that the subject property possesses the locational characteristics required by the purpose clause and conforms with the recommendations of the local master plan. Site access and environmental issues must be evaluated and determined by the Planning Board later in the process.

B. Compatibility

The application of the LDRCD Zone to the subject property would permit development of no more than five lots, at a density of one dwelling unit per five acres, with a minimum lot size of 40,000 square feet. The existing pattern of development in the surrounding area reflects substantial open space and homes developed on lots of two acres or larger.

The opposition (*see* discussion of Vacchio letter) contends that the proposed development would not be compatible with the character of the adjacent neighborhood because it would destroy the wooded vistas the neighborhood currently enjoys when looking at the Lockwood property, alter the rural character of the site, and create unwanted noise, and because the minimum lot size in the zone is too small.

Although the Applicant stressed that the proposed development would apply the same two-acre minimum lot size prevalent in the surrounding area, the application for re-zoning must be evaluated based on the development permissible under the zone, not on a non-binding Concept Plan and good-faith intentions. Accordingly, my analysis considers the compatibility of a maximum of five residential dwellings on lots at least 40,000 square feet in size.

Buffering. Because the stream buffers render the southern portion of the site undevelopable, the development of the site would necessarily leave a very substantial wooded buffer between the residential lots and existing residential property south of the site. Similarly, the steep, wooded slopes in the northeast corner of the site are likely to serve as a natural buffer due to the difficulty of building on such terrain. The LDRCD Zone requires that at least 60% of the site be permanently preserved as open space. That requirement makes it very likely that open space would buffer much of the impact of this development on surrounding residences. The Lockwood property has the capacity for ample buffering, which is the most relevant question at the zoning stage. The subdivision and site plan processes will provide the opportunity to ensure appropriate orientation of homes and buffering, if the requested re-zoning is approved.

Noise. One opposition letter states that with the development of the Lockwood property, the “tranquil sounds of the forest will give way to the noises of leaf blowers, lawn mowers, automobiles and machinery.”⁸ While any home-building will lead to some increase in the noises associated with human activity, the subject site is located in an area that has already seen a significant amount of residential development. The addition of five homes clustered on 28 acres of land is unlikely to significantly alter the types and quantities of noise experienced by residents of Norbeck Knolls or other nearby developments, who share their wooded neighborhood with other families.

Rural character. One of the purposes of rural cluster zoning is precisely to allow residential development while preserving the rural character of the site. Development under the LDRCD Zone is much more likely to preserve the rural character of the Lockwood property – by leaving large portions of the property in their current state – than the type of development permitted under the RE-2 Zone.

⁸ Vacchio letter at 4.

Lot size. The opposition's contention concerning lot size isolates compatibility to a narrow comparison of acreage and ignores the overall density of the site, as well as Planning Board oversight with respect to setbacks, screening, and landscaping. Even if this approach were followed, it does not establish incompatibility. The use of lot size alone as a sole factor in evaluating compatibility is not determinative. The character of a neighborhood is an aggregate of a number of features and traits which make up the neighborhood. Lot size is only one characteristic. *See Lee v. Maryland National Capital Park and Planning Comm.*, 107 Md.App. 486, 668 A.2d 980 (1995); *see also, Kanfer v. Montgomery County Council*, 35 Md.App. 715, 373 A.2d 5 (1977) (Density alone is not a valid reason to deny a floating zone).

Whole-parcel analysis. Compatibility must be evaluated on a whole-parcel basis. Otherwise, a compatibility analysis could be fragmented into an endless comparison between isolated elements of two adjacent parcels which lack any meaningful significance. In the present case, this evaluation must focus on the impact of a five-lot development together with the permanent open space created by the cluster method. *See North v. St. Mary's County*, 99 Md.App. 502, 638 A.2d 1175 (1994) (whole parcel analysis is the preferred approach in evaluating land use issues). When the whole parcel at issue is evaluated, the proposed development clearly is compatible.

The proposed land use is identical to the existing land use on adjacent properties. The adjacent property is classified under the same zone sought for the subject property, and has an approved subdivision plan and site plan. The overall density on the subject site would be lower than most adjacent properties and would provide greater open space. The site has the capacity to use its significant tree cover and other environmental features for perimeter buffering. In terms of land use, density and scale of development the proposed development is compatible and would not alter the rural character of the neighborhood.

For purposes of zoning stage review, the proposed development would be compatible with land uses in the surrounding area.

C. Public Interest

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities.

The proposed zoning conforms with the specific recommendations of the 1980 *Olney Master Plan* because the subject site is recommended for classification under the Rural Cluster Zone, which permits the same type of development allowed under the LDRCD Zone. Both Technical Staff and the Planning Board recommend approval, which serves as a strong indication that the proposed zoning is consistent with current planning policies for this area of the County.

The record contains no persuasive evidence that the proposed development would have an adverse impact on the area road network or other public facilities. The contention by a party in opposition that the development would tax the local road network was without substantial evidentiary support.

IV. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I make the following conclusions:

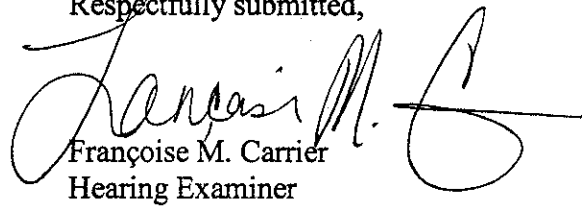
1. The application satisfies the requirements of the purpose clause;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area;
3. The requested reclassification to the LDRCD Zone bears sufficient relationship to the public interest to justify its approval.

V. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-794, for the reclassification from the RE-2 Zone to the Low Density Rural Cluster Development (LDRCD) Zone of 28.48 acres known as part of Snowden's Manor, located north of Norbeck Road between Georgia Avenue and Layhill Road, Olney, in the 8th Election District, be *approved*.

Dated: February 25, 2002

Respectfully submitted,


Françoise M. Carrier
Hearing Examiner

FMC:nzf